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No. 96-1092

In The

Supreme Court of the United States

October Term, 1996

BRYAN H. CRAWFORD and JIM ATWELL, a partnership doing business as ADVANCED PUBLICATIONS; ISG COMMUNICATIONS, INC., a California corporation; BOLD TYPE, INC., a California corporation; WAYNE C. BERRY, doing business as ZAP DISTRIBUTORS; and LISA LASCODY,

Petitioners,

v.

DANIEL E. LUNGREN, Individually and as Attorney General of the State of California; JAMES KENNETH HAHN, individually and as City Attorney for the City of Los Angeles; CHIEF WILLIE WILLIAMS, individually and as Police Chief for the City of Los Angeles; GILBERT GARCETTI, individually and as District Attorney of the County of Los Angeles; THOMAS W. SNEDDON, JR., individually and as District Attorney of the County of Santa Barbara; MICHAEL D. BRADBURY, individually and as District Attorney of the County of Ventura,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE OF COURT TO FILE BRIEF AS AMICI CURIAE AND BRIEF OF STATE SENATOR RAY HAYNES; ASSEMBLYMEN STEVE BALDWIN, HOWARD KALOOGIAN, AND BILL MORROW; THE UNITED STATES JUSTICE FOUNDATION; HELP OPPOSE PORNOGRAPHY AND EXPLOITATION; AND END RADIO AIR SMUT EFFECTIVELY; AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE OF COURT TO FILE BRIEF AS AMICI CURIAE OF STATE SENATOR RAY HAYNES; ASSEMBLYMEN STEVE BALDWIN, HOWARD KALOOGIAN, AND BILL MORROW; THE UNITED STATES JUSTICE FOUNDATION; HELP OPPOSE PORNOGRAPHY AND EXPLOITATION; AND END RADIO AIR SMUT EFFECTIVELY; IN SUPPORT OF RESPONDENTS

I. INTERESTS OF THE *AMICUS CURIAE*

California State Senator Ray Haynes; Assemblymen Steve Baldwin, Howard Kaloogian, and Bill Morrow; the United States Justice foundation ("USJF"); Help Oppose Pornography and Exploitation ("HELP") and End Radio Air Smut Effectively ("ERASE") (collectively "Amici") move pursuant to Rule 37 of the Rules of this Court for leave to file the accompanying brief as amici curiae in support of respondents. Amici sought written consent from petitioners and respondents. Respondent Attorney General Daniel E. Lungren consented. Petitioners did not respond to Amici's request for written consent to file this brief.

Amici include four members of the California legislature and three-non-profit organizations. All four amici members of the California legislature were members of the California legislature when the statute being challenged in the current litigation was enacted, and therefore have an interest in implementation of the statute. In addition, as Vice-Chairman of the Assembly Judiciary Committee, Assemblyman Morrow has special interest in the administration of state law in California, including the legality of statutes such as California Penal

Code 313.1(c)(2), which regulates a minor's access to pornography.

USJF is a non-profit corporation organized under the laws of the state of California and dedicated to the promotion of constitutional rights. Since its inception in 1979, USJF has regularly assisted individuals and classes, not only to redress individual acts of injustice, but also to promote important public policy matters affecting constitutional claims. For example, among others, USJF has filed briefs amicus curiae in the United States Supreme Court in support of the constitutionality of California's Proposition 13 and an Arkansas state Congressional term limits law; in the California Supreme Court in opposition to claims that the Unruh Act requires atheists to be admitted to the Boy Scouts; and in the Ninth Circuit Court of Appeals in support of a California welfare reform law. USJF is very concerned about the constitutionality of laws which restrict a minor's access to pornography and sexually-explicit publications, and along with the other amici seeks to submit its views to the Court in the attached brief.

HOPE is a nonprofit California corporation organized to educate the public specifically on issues surrounding pornography. HOPE monitors the pornography business, collects information, and conducts scholarly research on the effects of pornography on individuals and society.

ERASE is a San Diego-based association concerned with the effects of "harmful matter" on young people.

Amici's active involvement in and special knowledge of constitutional issues regarding the First Amendment

enable them to provide an important perspective to this Court. In their brief, Amici assert that the petitioners' interest at stake is merely an economic burden which fails to give rise to a First Amendment violation, and that the Court of Appeals properly concluded that specific findings to justify enactment of the California statute restricting the dissemination of adult speech are not necessary.

For the foregoing reasons, Amici respectfully request leave of Court to file this brief *amici curiae* in support of respondents.

Respectfully submitted,

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Dated: February 11, 1997

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INTEREST OF *AMICI CURIAE*

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Amici's active involvement in and special knowledge of constitutional issues regarding the First Amendment enable them to provide an important perspective to this Court.

SUMMARY OF THE FACTS AND CASE

In 1994 the California legislature enacted and Governor Wilson signed into law a statute which makes it unlawful to sell adult materials in vending machines which are not supervised by an adult. Cal. Penal Code §313.1(c)(2). The law provides certain defenses, including the utilization of a "card" or "token" system for purchase of such adult materials from unattended vending machines. Cal. Penal Code §313.1(h). The District Court found that the State of California has a compelling interest in shielding minors from the influence of literature that is not obscene by adult standards. (App. 32).[1] In late

[1] As used in this brief, the abbreviation "App." refers to the petitioner's appendix before this Court, and the number following the abbreviation refers to the page number in petitioner's appendix.

1994, the petitioners, who are publishers and distributors of self-described "sexually-oriented" newspapers,[2] filed an action in the U.S. District Court for the Central District of California to enjoin enforcement of the statute and to declare it unconstitutional. The publishers who challenge enforcement of the statute produce such titles as "Hollywood Playdates," "Kinky," and "Swinger" magazines. (App. 25). After initially issuing orders restraining enforcement of the statute, on October 20, 1995, Judge Manuel L. Real reversed his prior Orders, denied the request for a permanent injunction, and upheld Cal. Penal Code §313.1(c)(2) under the United States Constitution. On October 27, 1995, the petitioners filed their appeal to the Ninth Circuit Court of Appeals. The petitioners claimed that the statute violates their First and Fourteenth Amendment rights to freedom of speech. On September 11, 1996, the United States Court of Appeals for the Ninth Circuit affirmed the decision of the District Court.

SUMMARY OF ARGUMENT

Amici contend that petitioners' adult sexually-oriented material is not entitled to the constitutional rights claimed. Amici argue that petitioners' adult matter is commercial speech, not political advocacy, and as such is not entitled to the heightened level of constitutional scrutiny associated with "pure" speech. Amici argue that

[2] Petitioner's opening brief before the Court of Appeals, p.3.

petitioners are entitled to sell their magazines and newspapers when they are directed to the intended audience of adults, but that the interest of the State of California in protecting children from exposure to such "harmful matter" greatly outweighs petitioners' right to distribute its magazines and newspapers in vending machines, especially when alternative means of distribution are readily available to petitioners.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT PETITIONERS' TRUE INTEREST AT STAKE IN THIS CASE – THEIR ABILITY TO PROFITABLY SELL ADULT MATERIALS SOLELY THROUGH NEWSRACKS – IS MERELY AN ECONOMIC BURDEN WHICH FAILS TO GIVE RISE TO A FIRST AMENDMENT VIOLATION.

The factual findings in this case reveal that the only harm to petitioners from implementation of the statute is an economic burden. The District Court found that petitioners "have not proven an interest other than a commercial interest in increased profits from distributing their publications by means of news racks, as opposed to alternative means of distribution." (App. 31). This commercial interest stems from the result that petitioners apparently will no longer be able to distribute materials through unattended newsracks, which has been their primary method of distribution. As the District Court findings state, "[n]either Advanced Publications nor ISG owns any vending machines over which they have no control. Virtually all of the sales of these newspapers are

through vending machines", (App. 25), and "[i]t is likely that [the statute] . . . will make it difficult for Advanced Publications to continue distributing its publications by vending machines." (App. 26-27).

The District Court determined, however, that petitioners are not without recourse to alternative means of distribution: "Reasonable alternative means of communication other than newsracks exist for Plaintiffs to distribute the publications for which they seek injunctive protection in this lawsuit." (App. 31). "All of the thousands of newsstands, liquor stores, bookstores, markets, and other retail outlets in California are available to Plaintiffs, unaffected by the statute." (App. 31).

Petitioners are already using alternative means of distribution for some of the materials they distribute. The parties stipulated that petitioner Advanced Publications distributes their monthly magazines *Kinky* and *Swinger*, "which are identical in subject matter to its vending machine publications", through adult book stores and liquor stores. (App. 25). In referring to petitioner Bold Type and its newspaper *Spectator*, the parties stipulated that "about half of the papers sold each week are sold through newsracks, with the balance through stores and subscriptions." (App. 26). These facts demonstrate that petitioners have a real, and not just hypothetical, access to an alternative network of distribution for their adult matter.

Petitioners claim that despite these facts, such networks are not accessible to them. "Despite [petitioner] Advanced Publications' repeated efforts to expand the distribution of the newspapers it presently distributes in

vending machines into retail outlets, very few of such outlets are interested in selling those newspapers, and it therefore appears that very few retail outlets would be interested in selling tokens." (App. 27). Petitioner ZAP, a news rack distributor, "had earlier experiences in which local liquor stores and magazine stand owners refused to carry the newspaper ZAP distributes in its vending machines." *Id.*

This Court considered the economic burden of First Amendment restrictions on persons selling sexually-oriented commercial speech in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925 (1986). The *Renton* Court considered the economic effects on owners of adult theaters in upholding a zoning ordinance which prohibited adult theaters from locating near residential zones, single or multiple-family dwellings, churches, parks or schools. Theater owners argued that "practically none" of the remaining undeveloped land in the city was currently for sale or lease, and so the zoning ordinance imposed an undue restriction on their speech. 475 U.S. at 53, 106 S.Ct. at 932. This Court disagreed, stating "that respondents must fend for themselves . . . does not give rise to a First Amendment violation." 475 U.S. at 54, 106 S.Ct. at 932. This Court further stated that:

> we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices. [*Citing American Mini Theatres*, 427 U.S. 50, 78, 96 S.Ct. 2440, 2456 (1976) (Powell, J., concurring)] ("*The inquiry for First Amendment purposes is not concerned with economic impact*").

Id. (Emphasis added). The *Renton* Court concluded that the First Amendment required only that the government enforcing an ordinance refrain from effectively denying persons a reasonable opportunity to engage in their speech within the city. *Id.*

According to the *Renton* Court's reasoning, to be constitutionally permissible, the California newsrack statute must refrain from effectively denying petitioners a reasonable opportunity to disseminate their "harmful" adult matter. The District Court found that the statute had no effect on petitioners' ability to secure alternative means of distribution. "Any unwillingness of retailers to handle Plaintiffs' publications is in no sense attributable to the statute." (App. 31). Moreover, the District Court determined that petitioners "have not proven that they would be *unable* to distribute their publications by means other than newsracks." (App. 31) (Emphasis added). Indeed, the factual findings show that at least one petitioner already successfully utilizes a distribution network, which does not use newsracks, for its other adult materials. (App. 26). At best, petitioners can only claim that the California Penal Code "will *make it difficult* for Advanced Publications to continue distributing its publication *by vending machines*" (App. 27) (emphasis added). By their own stipulation to this fact, petitioners concede that they are not totally foreclosed from distributing their adult matter. Instead, they present factual findings which state that the use of vending machines as prescribed by the statute (with the use of adult supervision or identification cards and tokens) is prohibitive because it is merely inconvenient, but not impossible. Petitioners stipulated that the use of vending machines under adult

supervision "would not be commercially feasible", (App. 27), and that vending machines using identification cards "are not suitable for street use because of the threat of vandalism", (App. 27). Yet, according to this Court's interpretation of the First Amendment in *Renton*, the State of California is not compelled to ensure that "any other kind[ ] of speech-related businesses", such as petitioners, "will be able to obtain sites at bargain prices." *Renton*, 475 U.S. at 54, 106 S.Ct. at 932 (*citing American Mini Theatres*). Just because implementation of the statute would make the newsracks more expensive or even impractical for petitioners to distribute their adult matter does not foreclose newsracks as a "reasonable opportunity", *Renton*, 475 U.S. at 54, 106 S.Ct. at 932, of distribution for purposes of the First Amendment, especially in light of the fact that petitioners have alternate means of distribution, such as liquor stores and adult book stores.

Petitioners' argument that the statute imposes a "total ban" on speech, (Petition at 15), fails, because it is an exaggeration unsupported by the facts, as other means of dissemination for petitioners' materials clearly exist. The factual findings of the District Court which consider the economic impact in this case also meet the standards which this Court set forth in *Renton*, because these findings show that a reasonable opportunity to engage in dissemination not only exists for petitioners' materials, but is already utilized by at least one petitioner for similar materials.

Even if no merchant wanted to sell petitioners' materials, the result would not be fatal to the statute. This Court in *Renton* concluded: "that respondents must fend

for themselves . . . does not give rise to a First Amendment violation." 475 U.S. at 54, 106 S.Ct. at 932. Given this reasoning, the Court of Appeals did not err in concluding that the consequence that merchants do not wish to carry the material "is no fault or business of the State." *See* Court of Appeals decision, (App. 18), *citing Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*, ___ U.S. ___, ___, 116 S.Ct. 2374, 2387, 135 L.Ed.2d 888 (1996) (Breyer, J. writing for plurality).

In sum, the harm to petitioners is that they will have to change the way they conduct business, which may be impractical and add additional costs to their product. Impracticality and expense, however, are economic factors which this Court has never recognized as having any weight in construing the constitutionality of laws restricting adult commercial speech where the State has an otherwise compelling interest to support its regulation. Neither have petitioners anywhere cited that such factors have any place in this Court's First Amendment analysis of their case. Given the foregoing facts, the Court of Appeals did not err in holding that "the statute is not prohibitively invasive of any adult's interest in obtaining the materials", (App. 18), and reaching that conclusion by considering the real alternatives available to petitioners and to the public.

The determinant issue in this case is the California newsrack statute's detrimental infringement not on petitioners' free speech, but on petitioners' ability to make

profits by using newsracks as their primary means of distribution. Amici assert that these "harms" to petitioners are simply innocuous economic attributes of constitutionally-protected state regulation. As this Court has reasoned in *Renton*, such attributes do not justify the denial to the local government of its interest in protecting children from adult-oriented commercial speech. Yet, petitioners selfishly argue for the preservation of their profit-making interests at the cost of denying the State of California its compelling interest in shielding its children from the adult material the petitioners sell, such as "pictorial advertisements" soliciting "phone sex" and lists of "telephone numbers for particular services". (App. 31). Amici assert that the Constitution should not be the means by which vendors of adult materials can keep comfortably in profit, at the expense of forsaking the state interest to shield its youngest citizens from such obviously harmful material.

Petitioners' arguments concerning total bans on its speech can only be characterized as a red herring designed to lead this Court away from the true issue at hand, the ability of the petitioners to make more money disseminating adult materials through newsracks, which this Court has concluded is not a First Amendment issue. *Renton*, 475 U.S. at 54, 106 S.Ct. at 932. Amici assert that businesses such as petitioner, which engage in selling commercial speech, should not be permitted to so abuse the Constitution for economic gain. Even though petitioners veil their arguments in "pure speech" First Amendment rhetoric, the facts presented before the Courts below raise only economic, not constitutional,

issues for petitioners, which easily satisfy this Court's requirements for constitutionality.

II. THE COURT OF APPEALS PROPERLY CONCLUDED THAT SPECIFIC FINDINGS TO JUSTIFY ENACTMENT OF THE CALIFORNIA STATUTE RESTRICTING THE DISSEMINATION OF ADULT SPEECH ARE NOT NECESSARY.

A. This Court Upheld Restrictions on Adult Speech Without Evidentiary Findings in *FCC v. Pacifica Foundation*

The Court of Appeals properly concluded that "even in the absence of findings or specific evidence, courts can and will rely on common sense, other statutes, and other cases when it becomes time to consider claims in this area." (App. 12-13). This reasoning is consistent with *FCC v. Pacifica Foundation*, 438 U.S. 726, 98 S.Ct. 3026 (1978), where this Court upheld a statute which permitted the Federal Communications Commission (FCC) to restrict indecent speech in the presence of children without evidentiary findings. The *Pacifica Foundation* Court upheld the Commission's reliance on its unilateral determination that certain speech was indecent when broadcast in the presence of children. The Court did not require specific evidentiary findings or studies proving that such reliance was proper.

This Court upheld the FCC's unilateral decision to restrict speech without one iota of evidence supporting the FCC's conclusion that the speech at issue – certain words in George Carlin's "Filthy Words" monologue – was indecent to children. "The Commission identified

several words . . . , stated that the repetitive, deliberate use of those words in an afternoon broadcast when children are in the audience was patently offensive, and held that the broadcast was indecent." *Id.* at 738. The Commission apparently conducted no studies in reaching its determination to restrict speech, and no specific evidentiary findings are presented or considered in this Court's opinion.

The Commission restricted speech in response to a listener's "strenuous complaint" in determining to restrict speech. *Id.* at 747 n.25. "As the Commission itself emphasized, its order was 'issued in a specific factual context.' [Citation omitted.] That approach is appropriate for courts as well as the Commission when regulation of indecency is at stake, for indecency is largely a function of context – it cannot be adequately judged in the abstract." *Id.* at 742. Likewise, the California legislature envisioned a factual scenario through which children could be harmed by certain types of speech – the distribution of harmful materials through unattended newsracks – and enacted a law to restrict the distribution of such speech. An anecdotal, unverified complaint to the FCC from a father setting forth a factual circumstance, as in *Pacifica Foundation,* is no different from a factual scenario here envisioned by the California legislature. This Court upheld the FCC's decision without requiring the Commission – as a quasi-legislative body similar in function to the California legislature – to make specific factual findings concluding that certain language over the medium of radio is indecent when heard by a young child. Thus, the Court of Appeals was proper in concluding that no such evidence was necessary in this case.

B. This Court in *Pacifica Foundation* Upheld a Regulation which Substantially Restricts the Dissemination of Adult Materials

This Court's ruling in *Pacifica Foundation* can be applied to other mediums to which children would be exposed to adult, sexually-oriented material. *Pacifica Foundation* briefly acknowledges that "each medium of expression presents special First Amendment problems," 438 U.S. at 748, and that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *Id.* This Court's ruling does not, however, stand for the proposition that there should never be restrictions on speech in media other than broadcasting.

The *Pacifica Foundation* Court permitted the FCC to restrict speech based on the same issue raised in the case at hand: the harm in easily accessible adult, sexually-oriented speech to children. "The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*,[3] amply justify special treatment of indecent broadcasting." *Id.* at 750. In *Pacifica Foundation*, this Court foreclosed adults from obtaining access to certain speech from a particular

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[3] Here, this Court refers to its decision in *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274 (1968), in which this Court held that "the government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household' justified the regulation of otherwise protected expression." *Id.* at 749. Similar interests are at stake in the instant case. (App. 11) ("Protecting the physical and psychological well-being of children").

medium – radio in the afternoon – because of the accessibilty of such indecent speech to children, but the Commission's ruling did not render such speech inaccessible to adults.[4] Similarly, in the instant case, the Court of Appeals properly upheld a statute which forecloses adults from obtaining access to harmful speech distributed through a particular medium – unattended newsrack – because of the same reason: the easy accessibility of such harmful speech on children. As in *Pacifica Foundation*, in the instant case, adults are not foreclosed from obtaining the same material through a safer medium not invoving children, such as distribution using tokens or idenification cards, or through other sources.

Given these similarities, the fact that *Pacifica Foundation* involved the broadcasting medium is irrelevant, because the underlying rationale for upholding the restriction on speech – the easy accessibility of harmful speech to children – is present in both that case and the case at hand. Petitioners have nowhere distinguished why their harmful materials are any less accessible to children than was the speech in *Pacifica Foundation*. In fact, the very reason the California legislature enacted the newsrack statute obviously is to make harmful material

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[4] "Adults who feel the need may purchase tapes and records or go to theaters and nightclubs to hear these words." *Id.* at 750 n.28. This Court also acknowledged that alternative mediums of distribution of matter may cater specifically to adults and not to children; "Other forms of offensive expression may be withheld from the young without restricting the expresion at its source. Bookstores and motion picture theaters, for example, may be prohibited from making indecent material available to children." *Id.* at 748.

less accessible to children. Whether the medium is print or broadcast is yet another red herring the petitioners would have this Court chase without examining the real issue at hand: the too easy accessibility of petitioners' materials to children through unattended newsracks, which the statute remedies. Given this case at hand's similarity to *Pacifica Foundation,* the Court of Appeals properly ruled to uphold the California newsrack statute.

CONCLUSION

For the foregoing reasons, this Court should deny petitioner's writ of certiorari.

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